

**ADMINISTRATIVE APPEAL DECISION FOR
APPROVED JURISDICTIONAL DETERMINATION
FOR THE GIBBONS TRUST I & II PROPERTY**

ARROYO CITY, CAMERON COUNTY, TEXAS

ARMY CORPS OF ENGINEERS FILE NO. D-13290

GALVESTON DISTRICT

17 September 2003

Designated Review Officer: Mr. Andrew Commer, US Army Corps of Engineers, Southwestern Division, and Dallas, Texas

District Representatives: Mr. Lloyd Mullins and Ms. Marie Patillo, Corpus Christi Field Office, Galveston District, Texas

Appellant: Mr. Steven A. Floyd, Gibbons Trust I & II, Wells Fargo Bank, N.A. Trustee, Corpus Christi, Texas

Appellant Representative: Ms. Lynnda Kahn, Shiner Moseley and Associates, Corpus Christi, Texas

Appellant Parties: Mr. H.R. "Bud" Koch and Mrs. Linda Koch, Pelpro, L.L.C. (Developer), Rio Hondo, Texas

Authority: Clean Water Act (CWA), Section 404

Receipt of Request For Appeal (RFA) in SWD: May 9, 2003

Appeal Meeting Date: July 30, 2003 **Site Visit Date:** July 30, 2003

Background Information: The subject property is 223 acres along the right descending bank of the Arroyo Colorado River (ACR). The property lies in the floodplain between the ACR to the north and Texas FM Road 2925 to the south. The portion of the property in question is a depressional flood plain scar, likely the remains of a relic river channel or oxbow, locally known as a resaca. The property has been used continuously for many years as grazing lands for cattle. The Kochs, operating under the name Pelpro L.L.C., hold an option on the property for development intentions; the land is currently held in a trust and Mr. Floyd represents the current landowner. The ACR in this area has been improved for purposes of navigation upstream to the Port of Harlingen, Texas, located 12 miles southwest of the subject property.

The Appellant's agent provided a wetland determination to the Galveston District, Corpus Christi Field Office for review on May 28, 2002. This determination concluded that the property did not contain wetlands or other waters of the United States and was based on observations recorded during a May 2, 2002 site visit and on related supporting information. The District

reviewed this information and conducted a site investigation on November 6, 2002. On December 11, 2002, the District provided a written preliminary determination that the site contains waters of the United States, specifically wetlands, which are subject to Section 404 of the CWA. On March 12, 2003, the Appellant's consultant requested a formal approved jurisdictional determination for the property, again asserting their assessment that the depressional area is not characterized by hydrology sufficient for jurisdiction under the CWA. On April 15, 2003, the District provided an Approved Jurisdictional Determination reasserting the December 11, 2002, finding that the property contains waters of the United States, specifically wetlands, subject to CWA authority.

On July 30, 2003, at 1200 hours, a site meeting was held on the location of the subject property. All of the parties listed above were in attendance. Following this site meeting, at approximately 1400 hours, the parties gathered at the USDA Farm Services Agency office in San Bonito for clarifying questions and discussion of the pertinent issues. This meeting concluded at approximately 1530 hours.

Summary of Decision: I conclude the administrative record for this action does not support the District's conclusion that the Appellant's property contains wetlands within CWA jurisdiction. The appeal does have merit.

Appeal Evaluation, Findings and Instructions to the Galveston District Engineer (DE):

The Appellant provided seven reasons why they believed the District incorrectly applied the current regulatory criteria and associated guidance with respect to the determination that all three criteria for determining a wetland, and thus CWA jurisdiction, were met on the property.

Reason 1: The Appellant asserted that the property does not meet the definition of wetlands and more specifically, does not meet the hydrology criteria in the Wetland Delineation Manual (WDM).

FINDING: This appeal rationale does have merit.

ACTION: The District's administrative record does not adequately address the hydrology criteria of the WDM. The District shall reconsider its JD decision as appropriate with regard to wetland hydrology criteria and include sufficient documentation to support its JD.

DISCUSSION: The appellant's agent reported an absence of primary and secondary indicators of hydrology from her observations of the property. She also reported that the soil profile displayed weak hydric soil characteristics. While one may reasonably expect to find wetlands in a resaca bed along the ACR, the agent points out a number of contributing factors which may have caused a shift in the present hydrologic regime of the resaca towards a drier, possibly non-wetland regime. Among these factors are numerous drainage ditches and irrigation canals in the broad flood plain of the ACR in this area, ditches that may have caused a reduction in the size of the watershed draining to this site, and thus a reduction in the quantity of water on a seasonal basis available to replenish the site. Additionally, engineered improvements in the shape, capacity, and location of the ACR channel associated with the Port of Harlingen navigation

project may have reduced the frequency and effect of flooding of this site from the ACR. Portions of the excavated spoil from the original channel dredging were disposed of along the right bank of the ACR adjacent to this property. The appellant asserts that this spoil material has also reduced the hydrology of the site by restricting or preventing flooding of the site by the ACR. The agent recognizes that her site visit occurred at the end of a prolonged period of time with annual rainfall amounts below normal (7 of 9 years below normal). While in the data supporting the original jurisdictional request, the agent recognizes that this below normal rainfall may be resulting in a “false negative” with regard to her findings on hydrology indicators on site, the request for appeal asserts that this dry trend supports a determination that hydrology is lacking on site. Furthermore, the agent asserts these other hydrologic factors as noted above are more prevailing influences on the absence of hydrology expressed at the site.

The appellant asserts that the boundary between the upland and the depression is not “abrupt”. Topographically, there is no abrupt landscape break, only a gradual slope. With regard to the vegetation, the appellant’s agent sees a gradual shift in the occurrence of vegetation species from the upland species to the species found in the depression. The District sees a distinct change in the vegetative community over a short lateral distance and considers this change abrupt.

The scale of aerial photographs of the property is adequate to see a discernable and abrupt change in vegetation. However, the factor of abruptness of change is related to assumptions that may be reached in two situations in the WDM that do not apply to the present case. The first situation is where an onsite inspection is not necessary and the second situation is where an onsite inspection is determined necessary for a site less than 5 acres in size. The District did not rely on the related allowable assumptions in the WDM in establishing jurisdiction in this case. While the District and the Appellant disagree on whether the boundary between these two communities is distinct or abrupt, the abruptness of the change is not relevant to this appeal because they do agree that these are distinctly different plant communities.

Citing as support that the hydrologic regime has experienced a dry shift, the agent notes the difference between the National Wetland Inventory (NWI) map prepared in 1977 versus the 1999 NWI map. In 1977, the site was classified as a PEM1Y (a ponded-palustrine wetland with persistent emergent vegetation and a *saturated/semi-permanent/seasonal* hydrologic regime). The 1999 NWI map classifies the depression as a PEM1A (a ponded-palustrine wetland with persistent emergent vegetation and a *temporary* hydrologic regime). The agent believes that this change from a “Y” regime to an “A” regime corresponds with a reassessment of the hydrology on the site by the NWI.

The NWI has at times revised the classification codes on maps to remove or replace non-definitive or obsolete codes. Contact with the national office for the NWI program, confirmed that the disappearance of the “Y” hydrologic regime from the NWI map for this area was a result of disuse of non-definitive or “depreciated” hydrologic regime codes (personal communication with Mr. Jim Terry, National Map QA, US Fish and Wildlife Service (USFWS), St. Petersburg, Florida). As the “Y” regime code combines and overlaps three other regime codes (“B” – Saturated, “C”- Seasonal, and “F”- semi-permanent) this change represents a mapping refinement rather than a reassessment of the hydrology of the site. According to Mr. Terry, other

hydrologic regime codes that have been similarly dropped from use include “W” – Intermittently Flooded/Temporary, and “Z” – Intermittently Exposed/ Permanent.

The District reviewed the information provided by the appellant and conducted a site inspection of the property. In contrast to the agent’s site visit, the District’s November 2002 inspection of the site occurred closely after two months of heavy, above normal rainfall in the region. The District noted the presence of 12 to 20 inches of water across much of the depression on site. The District relied upon the obvious primary indicator of hydrology present on the site at the time of inspection. The District noted the dominance of obligate (OBL) wetland plants, *Batis maritima* and *Monanthochloe littoralis* in the depression. The WDM allows the assumption of the presence of hydric soils on a site where the hydrology criterion is met and all dominant plant species have an indicator status of OBL or facultative wet (FACW). In accordance with this provision of the WDM and in consideration of the inundation across the property, the District did not attempt to dig a soil sample. The District’s record of the site inspection noted that a definite wetland/non-wetland boundary could not be determined due to the inundation of the site. Based on this information, the District concluded that the site contained wetlands.

While the District’s investigation of the property is consistent with the procedures and standards of the WDM, undue reliance was placed on inundation (primary hydrology indicator) that may not be representative of normal circumstances resulting from normal precipitation patterns. The District bears an obligation to demonstrate that such extreme conditions are not necessary to establish CWA jurisdiction on a property. Whereas both extreme drought and extreme wetness could occur in any given year, jurisdictional determinations must be based upon hydrology conditions which could be expected to occur *in most years*. Neither the information provided by the appellant nor the information provided by the District supports applying their conclusion regarding hydrology to hydrology that would prevail under normal conditions.

I conclude the District has not persuasively demonstrated that under normal circumstances the depression meets the hydrology criterion of the WDM. The District is directed to re-examine the indicators for hydrology for the subject site.

Reason 2: The Appellant asserted that the vegetation on the property is not indicative of wetland plant community but rather indicates a high salt content in the soil.

FINDING: This appeal rationale does not have merit.

ACTION: No action necessary.

DISCUSSION: The appellant and the District do not disagree on the identification of the plants observed on site. The plant community in the depression consists of *Batis maritima* (OBL), *Borrichia frutescens* (FACW), *Monanthochloe littoralis* (OBL), and *Spartina spartinae* (FACW+). This community constitutes a hydrophytic plant community according to the standards of the WDM. The vegetative community in adjacent uplands is composed of prickly pear (*Optunia sp.*), mesquite (*Prosopis sp.*), lime prickly ash (*Zanthoxylum fagara*), spiny hackberry (*Celtis pallidai*), and other upland species.

The Appellant asserts that the change in communities is a result of a salt content gradient in the soil, but provides no substantiating evidence such as soil sample tests from either the depression or surrounding uplands. The Appellant specifically cites the high salt tolerance of a single species, sea-oxeye daisy or bushy seaside tansy (*Borrchia frutescens*), and its ubiquitous appearance in wetland and non-wetland environments make it an unreliable indicator species. The District recognizes the salt tolerance issues of *Borrchia* and looks at other corroborative features at a site when considering whether the occurrence of *Borrchia* on a property represents a wetland expression or a high salt expression. For this site, the District considered other corroborative factors such as the flood plain position, the depressional landform, the presence of water, information in the Natural Resource Conservation Service (NRCS) Soil Survey, and the presence of other obligate (OBL) and facultative wet (FACW) plant species. Based on these factors, the District concluded that the *Borrchia* appearance on this site was representative of conditions favoring wetland plants. I determine the District's considerations and conclusions regarding the wetland character of the vegetation in the depression were appropriate. This appeal rationale does not have merit.

Reason 3: The Appellant asserted that the hydrologic conditions exhibited during the time frame of the November 2002 District inspection of the site were atypical and uncharacteristically wet and therefore led to an incorrect determination.

FINDING: This appeal rationale has merit.

ACTION: The District's administrative record does not adequately address this issue. The District shall reconsider its JD decision with regard to the hydrology criteria and include sufficient documentation to support its JD.

DISCUSSION: Both the Appellant's site investigation and the District's site investigation occurred following atypical and opposing hydrologic extremes on the property. The Appellant's investigation was preceded by seven years out of nine years with below normal precipitation. Precipitation in the three immediately preceding months was also below normal. The Appellant noted the possibility that these "drought" conditions could be contributing to a "false negative" conclusion on hydrology. The Appellant's agent examined historic aerial photographs of the site and found evidence of hydrology in some but did not include any of these photographs or information in the delineation record on the property because the dates of the photographs (time of year) could not be determined.

The District investigation occurred after two months of extremely high rainfall in the area. At the time of the District's initial investigation in November 2002 when inundation was observed across the depression, portions of the highway approaching the site from the west were also under water. The District displayed some degree of caution by having other staff members drive by the property later in November and December 2002, and in January and March 2003, to observe whether the depression was still inundated. During these visits, photographs were taken showing the depression continuing to hold water. However, in consideration of the abnormally high rainfall in September and October, and continued heavy rainfall in November of 2002, the possibility remains that the observed inundation could be a residual effect of the extreme fall precipitation and thus not representative of normal circumstances.

The District provided no evidence of investigation of hydrology outside of the time frame influenced by the abnormal precipitation during the fall of 2002. Whereas, the visual observation of inundation on the date of a site inspection is normally a reliable indicator of wetland hydrology, the Corps bears a responsibility to determine what constitutes normal circumstances for the property. By relying solely on the inundation of the property resulting from anomalous precipitation, storm, or flood influences, the Corps fails to substantiate that inundation or saturation to the surface occur for the minimum criteria of no less than 5% of the growing season *in most years*. Where onsite observations of hydrology may reasonably lead to a false conclusion, either negatively or positively, then greater weight must be placed on recorded data from outside the potentially questionable time frame or onsite field data other than inundation/saturation. The WDM declares the visual observation of inundation as the most obvious and revealing hydrologic indicator. However, the WDM adds a caution. Specifically, seasonal conditions and recent weather conditions should be considered when relying on this indicator because these conditions can contribute to surface water being present on non-wetland sites. Whereas revisiting the site during the following months displayed some degree of caution, the District did not go far enough in establishing the presence of hydrology based on other evidence not directly influenced by the extreme precipitation of the fall of 2002.

This appeal rationale has merit. The District's administrative record does not adequately address this issue. The District shall reconsider its JD decision with regard to the hydrology criteria and include sufficient documentation to support its JD.

Reason 4: The Appellant asserted that the District's reliance on information in the published Soil Survey for the county rather than an onsite soil sample examination to determine the presence of hydric soils was inappropriate.

FINDING: This appeal rationale does not have merit.

ACTION: No action is necessary.

DISCUSSION: The United States Department of Agriculture (USDA) Natural Resources Conservation Service (NRCS) Soil Survey for Cameron County characterizes the soil in the depression as Lomalta soil series. The Lomalta soil is a hydric soil under natural conditions as designated by the NRCS and appears on the Cameron County Hydric Soils List as hydric (confirmed via personal communication with the USDA NRCS San Bonito office). This soil is a Category D hydric soil, the most severe wetness condition category, and normally occurs in depressions on the landscape. It is assigned Hydric Criteria Numbers 2B3 and 3. These technical criteria numbers indicate that Lomalta soils are hydric because: 1) Lomalta is in the Pell great group and is poorly drained or very poorly drained and has a frequently occurring water table at less than 1.5 feet from the surface for a significant period during the growing season if permeability is less than 6.0 inches/hour in any layer within 20 inches, and 2) Lomalta is a soil that is frequently ponded for long duration or very long duration during the growing season.

Portions of the surrounding landscape, particularly northeast, southeast and southwest of the depression, are mapped as the Willamar soil series. The NRCS confirms that Willamar (Extremely Saline) series is listed as a hydric soil and is also classified as a Category D hydric soil. Willamar is assigned Hydric Criteria number 2A and 3. These technical criteria numbers indicate that Willamar soils are hydric because: 1) Willamar is in an Aquic suborder, is somewhat poorly drained and has a frequently occurring water table at less than 0.5 feet from the surface for a significant period during the growing season, and 2) Willamar is a soil that is frequently ponded for long duration or very long duration during the growing season.

The District did not dig a soil pit on site due to inundation on the property at the time of the investigation. Furthermore, the District observed obligate wetland vegetation in the flooded depression and concluded, within latitude afforded in the WDM (Part IV Methods, Section D Routine Determinations, Subsection 2 Onsite Inspection Necessary) that a soil pit was not necessary to confirm the presence of hydric soils. The WDM states that “hydric soils may be assumed to be present when: a) all dominant plant species have an indicator status of OBL, or b) All dominant plant species have an indicator status of OBL and /or FACW (at least one dominant species must be OBL)”. Therefore, I conclude that the District acted within the latitude and discretion afforded in the WDM in relying upon information in the county soil survey and corroborating that to observations on site in choosing to not dig a soil pit and examine the soil. This appeal rationale does not have merit.

Reason 5: The Appellant asserted that the District relied upon the National Wetland Inventory (NWI) map classification for the property as temporarily flooded without due caution afforded in the WDM.

FINDING: This appeal rationale does not have merit.

ACTION: No action is necessary.

DISCUSSION: The Appellant notes that the WDM states that “wetlands classified as having a temporarily flooded or intermittently flooded water regime should be viewed with particular caution since this designation is indicative of plant communities that are transitional between wetland and non-wetland” (Part IV, Section B, Paragraph 54.b(1) National Wetland Inventory Products – Wetland Maps). The cautionary statement in the WDM is directed at the level of inaccuracy inherent to interpretation of aerial photography of these areas and favors field review of such sites.

The District noted that it does not afford the temporarily flood water regime an automatic hydrology qualifier but rather considers each instance on a case-by-case basis. The District displayed reasonable caution with regard to the classification of this site as a temporarily flooded water regime. The first level of caution is demonstrated by the District’s on-site investigation and evaluation of the appellant’s submitted jurisdictional request. A second level of caution is demonstrated by the District’s follow-up site reviews by other staff members in the area of the property during November and December 2002, and January and March 2003. The District clearly did not use the NWI classification as sole basis for wetland hydrology on this site. Without regard to the atypical hydrologic conditions exhibited during this time period due to

heavy precipitation discussed above, this level of site investigation and reinvestigation should be considered reasonable, appropriate, and adequate for any site classified as a temporarily flooded water regime. This appeal rationale does not have merit.

Reason 6: The Appellant asserted that if the property were wetland as concluded by the District, that it would be an “isolated” wetland and not an “adjacent” wetland according to SWG Guidance Policy 01-001 and therefore, would not be subject to jurisdiction under the CWA.

FINDING: This appeal rationale does not have merit.

ACTION: No action is necessary.

DISCUSSION: The Appellant states that the District has confirmed that the depression on the property represents a “perched” system (surface water driven) versus an “apparent” system (groundwater driven). This designation is then linked to the discussion in the Galveston District Policy 01-001, in Paragraph 3a, which states that it is possible to have a water situated in close proximity to navigable water and that water be isolated if it is “perched” and has no hydrologic connection.

It is important to note that “perched” in the Corps policy is not a correlation to a “perched” hydrologic system. The policy addresses proximity. The situation envisioned is one in which a water may be physically proximal to another water on a horizontal basis (such as when viewed from directly above) but where there is a substantial vertical distance or separation, such as an ocean cliff or river bluff which supercedes the horizontal proximity and precludes any hydrologic relationship between the two (CECW-OR Memorandum Guidance on Adjacent Wetlands, John P. Elmore, 30 March 1988). This situation involves no such substantial vertical separation. The vertical gradient exhibited on this site from the flood plain depression to the adjacent navigable river channel is comparable to a normal river and floodplain relationship. This is supported by the fact that this site is within the 100-year flood plain of the ACR. Furthermore, a drainage ditch from the eastern end of the depression provides a hydrologic connection to the ACR. Therefore, it is not isolated and perched status has no relevance in this appeal.

The Appellant argues that the land rises naturally from the depression to the ACR to the north. Noting that this rise, generally 10 to 15 feet above the river, reaches heights of 25 feet in some places, the Appellant asserts that this natural river berm is a barrier between the ACR and the subject depression. The cause for the greatest heights is that this berm has been artificially increased along a portion of the northern side of the tract by the disposal of dredged spoil from maintenance of the ACR navigation channel. The Appellant asserts that an old roadway (unimproved dirt track) roughly parallel to the riverbank acts as an additional (second) hydrological barrier, thus qualifying the depression as isolated according to Galveston District policy.

The quality of a hydrologic barrier must be determined by the lowest point on the perimeter and not by the greatest height that it achieves. Barriers, to be effective, must be continuous and entire. Therefore, an assessment of the effective barrier or barriers on the property must focus on

the lowest drainage point across the perceived barrier. In this case, the lowest point of elevation along this barrier line is likely located within the drainage ditch that proceeds eastward to the ACR from the eastern end of the depression. A natural river berm may act as a barrier in a situation where there is no discernable hydrologic connection. While it is reasonable to grant barrier status to this natural berm, an examination of the unimproved roadway revealed that it was constructed at grade and provides no additional barrier to between the ACR and the subject depression. Therefore, I find there is only one barrier, at most, present on the property between the ACR and the subject depression.

A barrier is only effective to the elevation at which a hydrologic connection perforates the perceived barrier. The effective flow line elevation of the ditch and the elevation of the lowest point in the river berm have not been correlated. It is concluded that the ditch flow line elevation is lower than the lowest point on the berm due to visual characteristics observed in the ditch and on aerial photography. If the ditch is the lowest point, the perceived barrier is not an effective barrier because the ditch provides hydrologic connectivity. If the berm is lower than the ditch then the controlling feature is the berm and I determine it constitutes a single barrier.

The Appellant provided two affidavits from area landowners on the ACR which assert that they have only seen the ACR overtop its banks in this area and flow across or inundate the adjacent flood plain one time in recent history, specifically during the storms associated with Hurricane Beulah in 1967. The Appellant therefore attributes the hydrology of the site to sheet flow and overland flow from storm events and not from flooding from the ACR. Clearly, the alterations of the ACR channel capacity for navigation purposes and the alteration of drainage patterns within and outside of the 100-year flood plain in this locale through the construction of ditches and irrigation channels have changed the dynamics of the flood plain and the nature of the immediate watershed drainage. However, the magnitude of these effects is uncertain. While sheet flow and overland flow *to* the depression would not qualify the depression as adjacent under Galveston District policy, the Appellants position does not address the potential flow *from* this depression through the ditch on the east end of the property to the ACR. This flow from the depression, although not observed on the date of site investigation and perceived to be infrequent, may be presumed to occur due to the physical characteristics and connectivity observed on site, and as well as those observable in maps and aerial photographs of the site.

Thus, I conclude this depression is directly connected to other water of the United States through the drainage ditch and is in reasonable proximity to these waters with only one potential physical barrier, a natural river berm. This appeal rationale does not have merit.

Reason 7: The Appellant asserted that the property in question has no nexus to interstate commerce and is therefore, not subject to CWA jurisdiction.

FINDING: This appeal rationale does not have merit.

ACTION: No action is necessary.

DISCUSSION: The Appellant believes on the basis of appeal reason 6 that the depression in question, even if determined to be wetlands, is hydrologically isolated. Proving a nexus to

interstate commerce is only necessary in situations where the Corps is asserting jurisdiction over isolated water. The nexus to interstate commerce is assumed for non-isolated (adjacent) waters or wetlands, either bordering, contiguous or neighboring to other waters of the United States, within the CWA definition of waters of the United States and consistent with national Corps policy and Galveston District policy. Activities in adjacent wetlands can have transferable effects on the quality of water, the volume of water and speed of delivery during storm events, the frequency and duration of flooding in the adjacent or downstream waters and therefore are appropriate for regulation under the CWA. Having dismissed the Appellant assertion that this depression is isolated and has no relation to other surface waters, appeal reason 7 has no basis and is accordingly discarded.

Information Received and its Disposition During the Appeal Review: No supplemental information was provided by the Appellant or the District in this appeal.

Conclusion: I conclude the administrative record for this action does not support the District's conclusion that the flood plain depression on the Appellant's property is within CWA jurisdiction. The appeal does have merit with regard to Appeal Reasons 1 and 3. The District Engineer is directed to reconsider its JD decision as appropriate with regard to wetland hydrology criteria and include sufficient documentation to support its JD.



MICHAEL L. SCHULTZ

Colonel, EN

Acting Commander